No. 15061

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Niukkanen, also known as William Albert Mackie,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, JOHN WILSON, Officer in Charge, Immigration and Naturalization Service Office,
Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

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To the Honorable Albert Lee Stephens, James Alger Fee and William J. Lindberg:

COMES NOW, appellant WILLIA NIUKKANEN, and respectfully petitions the above Court for a rehearing of his appeal in which an opinion affirming the judgment of the District Court was filed on February 8, 1957, for the following reasons and upon the following grounds:

I.

The Court erred in affirming the Judgment of the District Court in that it failed to consider the question of whether the Act of October 16, 1918, 40 Stat., 1012, as amended by Section 22 of the Internal Security Act of 1950, now Section 1251(a)(6)(c), Title 8, United States Code, is unconstitutional as a Bill of Attainder.

II.

The Court erred in finding that Petitioner was a member of the Communist Party in that it ignored the effect of the United States Supreme Court decision in *Mesarosh vs. United States,* 352 U. S. 1, 1 L. Ed. (2d) 1, 77 S. Ct. 1 (1956).

III.

The Court erred in failing to follow the United States Supreme Court's decision in *Galvan vs. Press,* 347 U. S. 522, 98 L. Ed. 911, 74 S. Ct. 727 (1954), as to the high court's definition of what constitutes nominal membership in the Communist Party.

IV.

The Court erred in not granting appellant suspension of deportation in that the Board of Immigration Appeals abused its discretion in relying upon evidence not material for determination of eligibility for suspension of deportation, as provided, Title 8, Sec. 1254 (a) (5), U. S. Code.

ARGUMENT

I.

Section 22 of the Internal Security Act of 1950 is an unconstitutional Bill of Attainder.

The Court upon oral argument gave notice to counsel that it would not consider any constitutional arguments raised in this case. The Court felt that it was foreclosed by the Supreme Court's opinions in *Galvan vs. Press,* supra, and *Harisiades vs. Shaughnessy,* 342 U. S. 580, 96 L. Ed. 586, 72 S. Ct. 512 (1951).

In neither of the above mentioned cases however did the Supreme Court reach the question of whether the section of the United States Code in question is an unconstitutional Bill of Attainder. One may search *Galvan* and *Harisiades* in vain for a mention in the court's opinions of any refernce to Bill of Attainder. The petitioner here raises an undecided point in regard to the constitutionality of the statute under which the government seeks to deport him. We feel that the Court should give consideration to Petitioner's argument that the Act constitutes a Bill of Attainder.

We have called to the Court's attention the fact that there is at this time pending decision before the United States Supreme Court the case of *Rowoldt vs. Perfetto,* which is number 34 on the October docket of the United States Supreme Court. This case has been argued and in the course of the briefs submitted, the issue of Bill of Attainder was raised by the Petitioner and will probably be decided by the Supreme Court. We feel that this

Court should either reach that issue itself, or hold this case under advisement until such time as the United States Supreme Court has pronounced its judgment on this issue.

II.

The Court erred in finding that petitioner was a member of the Communist Party.

In affirming the District Court's finding that petitioner was a member of the Communist Party, the Court failed to take into account the recent decision in *Mesarosh vs. The United States,* supra. In that case the defendant was alleged to have conspired to violate the Smith Act, and at the trial of the case a government witness, Mazzei, provided important testimony upon which basis defendant was convicted. After the case had reached The United States Supreme Court the government filed notice that the witness Mazzei had lied in other similar proceedings and that his testimony had been discredited. The government sought to have the case remanded to the trial court for further proceedings but the defendant moved the court for a new trial. Chief Justice Warren upheld the defendants' motion for a new trial upon the basis that the conviction had been at least in part obtained by the testimony of a discredited witness. The Court said:

> "The dignity of the United States government will not permit the conviction of any person on tainted testimony."

We believe that the policy laid down in the *Mesarosh* case applies as much to this deportation case as it

did to the criminal prosecution. Certainly the dignity of the United States is as much at stake in this proceeding as in an out and out criminal case.

Here the witness Lee Knipe is an admitted perjurer who lied about his criminal background in this proceeding and the Board of Immigration Appeals itself stated that his testimony was thus discredited.

We think that the resources of the United States in the prosecution of a deportation case such as this are great enough and the rights of aliens substantial enough so that more reliable and more respectable testimony than that offered in this case should be required of the government before a man 49 years old can be deported to a Finland which he has not seen since before he was one year old.

III.

The Court erred in failing to follow the United States Supreme Court's definition of "nominal membership" in the Communist Party.

As we pointed out in our opening brief on page 15, the Supreme Court in *Galvan vs. Press* stated that an alien member of the Communist Party must have been aware that he was joining an organization which operates as a distinct and active political organization before he can be deported. We think that this states in simple and positive terms that the government must bear the burden of proving that appellant knew that the Communist Party was a political organization. We think that the record is absolutely devoid of such proof.

IV.

The Court erred in not granting appellant suspension of deportation.

The statute covering suspension of deportation states that the government may recommend suspension when an otherwise deportable alien has shown that he has good moral character during ten years since the commission of the act constituting grounds for deportation, and hardship. The application for suspension of deportation was not denied because of any failure to meet the above specifications. Rather the Board of Immigration Appeals did not feel that appellant was justified in failing to answer certain questions and it did not approve of appellant't association with certain groups in Portland whose purpose is the protection of aliens subject to deportation. The record is devoid of evidence that these groups are in any way affiliated with or are fronts for Communist Party activities. On the contrary, the Board of Immigration Appeals recognizes the lack of such evidence but glosses it over. The government admits that this is a case of extreme hardship upon the family of the appellant. It admits that appellant is a person of good moral character. But it still refuses to grant him suspension in spite of all of the equities involved. We believe that this constitutes an abuse of discretion on the part of the government and think that the Court should insist that the government be scrupulously fair in exercising its discretion in cases of this sort.

For the foregoing reasons we respectfully urge the Court to grant a rehearing of this case and we are con-

vinced that on the basis of law and justice appellant should not be deported from this country.

Respectfully submitted,

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STATE OF OREGON)
) ss.
County of Multnomah)

I, Nels Peterson, do certify that I am one of the attorneys for appellant in the above case; that the foregoing petition for rehearing is in my judgment well founded and that it is not interposed for delay.

Nels Peterson